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7 KYLE EVERETT

8
9 **UNITED STATES BANKRUPTCY COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **OAKLAND DIVISION**

12 In re

13 PACIFIC THOMAS CORPORATION, dba
14 PACIFIC THOMAS CAPITAL, dba
SAFE STORAGE,

15 Debtor.

16
17 KYLE EVERETT, CHAPTER 11 TRUSTEE,

18 Plaintiff,

19 vs.

20 RANDALL WHITNEY aka RANDALL C.M.
WHITNEY aka RANDALL WORSLEY aka
21 RANDALL C.M. WORSLEY, an individual;
PACIFIC TRADING VENTURES dba SAFE
22 STORAGE MANAGEMENT COMPANY, a
California corporation; PACIFIC TRADING
23 VENTURES, LTD., a Nevada corporation; and
JILL V. WORSLEY aka V. JILL WORSLEY,
24 an individual,

25 Defendants.
26
27
28

Case No. 12-46534 MEH

Chapter 11

Adv. Proc. No. 13-04079

**CHAPTER 11 TRUSTEE KYLE
EVERETT'S OPPOSITION TO
DEFENDANT RANDALL WHITNEY'S
MOTION TO DISMISS ADVERSARY
COMPLAINT**

1 Plaintiff Kyle Everett, the duly appointed, qualified and acting Chapter 11 trustee
2 (“Trustee”) of the bankruptcy estate of Pacific Thomas Corporation dba Pacific Thomas Capital
3 dba Safe Storage (“PTC”) hereby responds to the Motion to Dismiss Adversary Complaint (the
4 “Motion”) filed in the above-captioned Adversary Proceeding by defendant Randall Whitney
5 (“Whitney”). The Trustee’s Complaint alleges sufficient facts to state the claims for relief
6 asserted against Whitney under the federal “notice pleading” standard.

7 **I.**

8 **STATEMENT OF PERTINENT FACTS**

9 On April 11, 2013, the Trustee filed a Complaint against Whitney and co-defendants
10 Pacific Trading Ventures, Pacific Trading Ventures, Ltd., and Jill V. Worsley (collectively, the
11 “Defendants”). The Complaint alleges that the Defendants have failed and refused to provide the
12 Trustee with the books, records, and accounts concerning the management and operation of
13 certain real property owned by PTC in Oakland, California (the “Premises”). Complaint, ¶1. The
14 Complaint further alleges that the Defendants have withheld significant funds from the Trustee by
15 misrepresenting that PTC had leased a significant portion of the Premises to defendant Pacific
16 Trading Ventures, and by claiming that the lease is effective. Complaint, ¶2. Based on these
17 allegations, the Complaint asserts claims for Declaratory Relief, Accounting, Turnover, and
18 Injunctive Relief against all of the Defendants.

19 Each claim adds further pertinent factual allegations. The Declaratory Relief claim
20 alleges that there is an actual controversy between the Trustee and the Defendants over whether
21 the purported leases of the Premises are null and void. Although the Complaint does not go into
22 further detail regarding the bases for the parties’ respective contentions on this issue, and further
23 detail is not necessary given the federal “notice pleading” standard for complaints, in an
24 Emergency Motion for Issuance of Temporary Restraining Order, etc., Doc. No. 3 filed April 11,
25 2013 (the “Emergency Motion”), the Trustee provided significant evidentiary support for his
26 position that the leases are void. Further detail is alleged in subsequent pleadings filed by the
27 Trustee, including those recently filed in support of his pending Motion to Sell Real Property Free
28 and Clear of Certain Interest scheduled for hearing concurrently with the Motion.

1 In the claims for Accounting, Turnover, and Injunctive Relief, the Complaint alleges that
2 the Defendants have failed to turn over and provide access to information regarding the Premises'
3 income and expenses; that any funds being withheld from the Trustee are property of the
4 bankruptcy estate and must therefore be turned over; and that the Court should require the
5 Defendants to permit the Trustee to inspect the Defendants' books and records, which allegations
6 formed the basis for this Court's Orders of April 12, May 14, and May 23, 2013.

7 On May 13, 2013, Whitney filed the Motion, which seeks dismissal of the Complaint
8 without leave to amend.¹ The Motion argues that the Complaint "states no legal reasons why the
9 leases to Pacific Trading Ventures might not be effective." Motion at 4:23-24. The Motion also
10 argues that the Complaint is defective because it fails to state what amounts must be turned over
11 to the Trustee, despite the fact that the Complaint alleges that these amounts cannot be
12 determined until the Trustee is given access to the Defendants' books and records. Motion at
13 5:14; Complaint, ¶29. Finally, the Motion asserts that the Trustee's attorneys should be denied
14 any attorneys' fees relating to this Adversary Proceeding through the Court's decision on the
15 Motion, notwithstanding the fact that no request to approve attorneys' fees has yet been filed.
16 Motion at 7:17-8:1. As discussed in detail below, each of these arguments lacks merit.

17 III.

18 LEGAL ARGUMENT

19 A. The Complaint Alleges Sufficient Facts to State a Claim.

20 Under Federal Rules of Civil Procedure ("FRCP"), Rule 8(a)(2), "A pleading that states a
21 claim for relief must contain ... a short and plain statement of the claim showing that the pleader
22 is entitled to relief."² Except in a few instances where heightened pleading standards are imposed
23 (none of which exist here), a complaint need not contain detailed factual allegations supporting
24 the claim for relief. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*
25 (1993) 507 U.S. 163, 168. Instead, a complaint is sufficient if it gives the defendant "fair notice
26 of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*

27 ¹ The remaining Defendants filed an Answer on May 22, 2013.

28 ² FRCP Rule 8(a)(2) is made applicable to this proceeding by Federal Rules of Bankruptcy
Procedure ("FRBP"), Rule 7008.

1 (2007) 550 U.S. 544, 555 (quoting *Conley v. Gibson* (1957) 355 U.S. 41, 47). The allegations of
2 the complaint should be liberally construed so as to do substantial justice. *Lynn v. Sheet Metal*
3 *Workers' Int'l Ass'n*, 804 F.2d 1472, 1482 (9th Cir. 1986).

4 Here, the Complaint gives Whitney fair notice of the claims against him and the grounds
5 upon which they rest. The Complaint alleges that Whitney and the other Defendants are in
6 possession of the books, records, and accounts concerning the management of the Premises, and
7 have failed to turn them over to the Trustee despite the fact that the Trustee, as the administrator
8 of PTC's bankruptcy estate, is entitled to them. The Complaint further alleges that the
9 Defendants have withheld funds from the Trustee in violation of the Bankruptcy Code, based on
10 the Defendants' contention that the leases of the Premises are effective when, in fact, the leases
11 are null and void. All of the counts asserted in the Complaint stem from this common nucleus of
12 factual allegations.

13 The Motion argues that the Complaint is deficient because it does not state the "legal
14 reasons" or the "legal basis" for various contentions made in the Complaint. *See, e.g.,* Motion at
15 4:23, 5:1, 5:17, 5:22. However, under the federal "notice pleading" standard, a complaint is not
16 required to provide legal theories. *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) ("Notice
17 pleading requires the plaintiff to set forth in his complaint *claims for relief*, not causes of action,
18 statutes or legal theories." Emphasis in original.). Accordingly, no further allegations regarding
19 the Trustee's "legal reasons" are required.

20 The Motion also criticizes the Complaint for alleging "that the trustee is entitled to a
21 turnover of 'all amounts due and owing to Debtor's estate' without stating what these amounts are
22 alleged to be." Motion, 5:13-14. However, the Complaint expressly alleges that the information
23 necessary to determine what amounts are due from the Defendants is contained in the very books
24 and records that the Defendants have wrongfully refused to provide to the Trustee. To dismiss
25 the Complaint for its lack of specificity in this regard would be to reward the Defendants for their
26 unlawful refusal to turn over documents to which the Trustee is entitled.

27 The Complaint alleges facts sufficient to put the Whitney on notice of the Trustee's claims
28 against him. These allegations therefore satisfy the governing pleading standards.

1 **B. If the Court Grants The Motion, It Should Grant Leave to Amend.**

2 The Trustee believes that the Complaint's factual allegations are legally sufficient, but if
3 the Court disagrees, then it should grant the Trustee leave to amend the Complaint. Under FRCP
4 Rule 15(a)(2), "The court should freely give leave [to amend the complaint] when justice so
5 requires."³ The Supreme Court has held that a court may deny leave to amend only where there
6 is an "apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part
7 of the [party moving for leave to amend], repeated failure to cure deficiencies by amendments
8 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
9 amendment, [or] futility of amendment." *Foman v. Davis* (1962) 371 U.S. 178, 183.

10 Here, Whitney has made no showing of any such reason to deny leave to amend. The
11 evidence that the Trustee presented in support of his Emergency Motion shows that there is ample
12 reason to believe that the leases of the Premises are null and void. If the Court finds it necessary
13 to include further allegations stating those reasons in a complaint, then the Court should give the
14 Trustee leave to amend his Complaint to allege these additional facts.

15 **C. The Motion's Argument Regarding Attorneys' Fees Is Improper And Premature.**

16 Finally, the Motion argues that the Court "should not approve any attorney's fees for the
17 trustee's attorneys relating to the adversary proceeding up through the hearing and decision on
18 this motion because they obviously [are] of no value to the estate." Motion, 7:17-19. Not only is
19 this argument not an appropriate subject of a motion to dismiss under FRCP Rule 12(b)(6), but
20 also the argument is premature, as the Trustee has not yet applied for payment of the fees of his
21 professionals. Whitney's objection to attorney's fees at this point is both unmeritorious and
22 procedurally improper.

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28 ³ Rule 15(a)(2) is made applicable to this proceeding by FRBP Rule 7015.

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IV.

CONCLUSION

The Complaint alleges sufficient facts to state claims for relief against Whitney under the liberal federal pleading standards. This Court should therefore deny Whitney's motion in its entirety.

DATED: June 12, 2013

BUCHALTER NEMER
A Professional Corporation

By: /s/ Ivo Keller
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KYLE EVERETT

1 **PROOF OF SERVICE**

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3 I am employed in the County of San Francisco, State of California. I am over the age of
4 18 and not a party to the within action. My business address is at BUCHALTER NEMER, A
5 Professional Corporation, 55 Second Street, Suite 1700, San Francisco, CA 94105-3493.

6 On the date set forth below, I served the foregoing document described as:

7 **CHAPTER 11 TRUSTEE KYLE EVERETT'S OPPOSITION TO DEFENDANT**
8 **RANDALL WHITNEY'S MOTION TO DISMISS ADVERSARY COMPLAINT**

9 on all other parties and/or their attorney(s) of record to this action as follows:

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24
25 ☒ **BY MAIL** I am readily familiar with the business' practice for collection and
26 processing of correspondence for mailing with the United States Postal Service. The address(es)
27 shown above is(are) the same as shown on the envelope. The envelope was placed for deposit in
the United States Postal Service at Buchalter Nemer in San Francisco, California on **June 13,**
28 **2013.** The envelope was sealed and placed for collection and mailing with first-class prepaid
postage on this date following ordinary business practices.

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4 ☒ **BY EMAIL** On **June 13, 2013**, I caused the above-referenced document(s) to be sent in
electronic PDF format as an attachment to an email addressed to the person(s) on whom such
document(s) is/are to be served at the email address(es) shown above, as last given by that
5 person(s) or as obtained from an internet website(s) relating to such person(s), and I did not
receive an email response upon sending such email indicating that such email was not delivered.
6

7 ☒ I declare under penalty of perjury under the laws of the State of California that the
8 foregoing is true and correct to the best of my knowledge. Executed on **June 13, 2013**, at San
9 Francisco, California.

10 ☒ I declare that I am employed in the office of a member of the bar of this court at whose
11 direction the service was made. Executed on **June 13, 2013**, at San Francisco, California.

12
13 Hallina Pohyar

/s/ Hallina Pohyar

(Signature)

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